agreement alleged was not a sufficient memorandum to comply with the requirements of the Statute of Frauds in that the purchaser named therein was acting, to the knowledge of the respondents, as agent for the appellant who was the principal and that the agreement did not identify the appellant as purchaser. Held that an agent who contracted in his own name did not cease to be contractually bound because it was proved that the other party knew when the contract was made that he was acting as agent. It was also held that the agreement which was made in his name did not cease in that event to contain the names of the contracting parties, and therefore did not cease to satisfy the Statute of Frauds; and, accordingly that, as the agent could have sued on the contract, so could his principal, the appellant.

The contract was with appellant but the foreign principal was made known later. That was not the first occasion respondents had business dealings with appellant. In the Po Hing project respondents performed similar services for appellant and were paid by appellant. It is immaterial that the cheque was issued by a third person. The point is that appellant made the payment himself. So that it is only reasonable that respondents should look to appellant for payment in the present case. After all, respondents knew nothing of and had nothing to do with the foreign principal except to send copies of the report on the instructions of appellant. The learned judge was entitled to accept the evidence of PW1 to show that appellant had made representation to him that the terms of the second payment would be the same as the first project, that is to say, respondents would look to appellant for settlement of bills in the second project in the same way as the first project. Everything respondents did was based on the instructions of appellant. Whether appellant can be personally liable on the contract is a question of construction having regard to the surrounding circumstances. As Pearce J. said in *Rusholme Ltd.* v. *S.G. Read Ltd.*[4] at page 183:—

"The fact that a person is agent and is so known to be does not itself prevent his incurring personal liability. Whether he does so is to be determined by the nature and terms of the contract and the surrounding circumstances. When he contracts on behalf of a foreign principal there is a presumption that he is incurring a personal liability, unless a contrary intention appears. The same presumption arises when he signs in his own name without qualification."

Appellant says he is the "authorised overseas agent." Whether the relationship of agency exists in the present case depends not on the use of terminology but on the exact circumstances of the relationship between the alleged principal and agent. The word "agent" may be used in at least two other senses. First, the word is frequently used to describe the position of a person who is employed by another to perform duties often of a technical or professional nature which he discharges as the other's alter ego and not merely as an intermediary between the principal and the third party, e.g. a solicitor who may be his client's agent for the purpose of instituting or continuing legal proceedings on his behalf. Secondly, the word has often been used in business in a complementary and not a legal sense, as in the case of the appointment of a "sole selling agent", "exclusive agent", or "authorised agent". The relation so established between the appointor and appointee is usually that of vendor and purchaser and no contractual relationship is established between the appointor of the agent and third parties by the sale of goods by the so-called agent to those third parties. See *Halsbury's* Laws of England, 4th Edition, Volume 1 page 419, paragraph 702.

In this case appellant elected to call no evidence. If on the evidence the learned judge is satisfied that respondents have proved their case he is bound to enter judgment against appellant. He has heard the parties on points of law and dealt with the authorities cited. As to his finding of facts there should be no interference. With respect, the learned judge was right to hold appellant personally liable in the light of the evidence. Accordingly, I would dismiss the appeal with costs. Deposit to respondents on account of taxed costs.

**Ong Hock Sim F.J.** and **Charles Ho J.** concurred.

*Appeal dismissed.*

Solicitors: *Yap & Chin; Robertson Pang & Co.*

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## MOHAMED JOHAN MUTALIB v. PUBLIC PROSECUTOR

**[F.C. (Lee Hun Hoe C.J. (Borneo), Ong Hock Sim F.J. and Charles Ho J.) October 3 and December 29, 1977]**

**[Kota Kinabalu — Federal Court Criminal Appeal No. 53 of 1977]**

*Criminal Law and Procedure — Sentence — Fine — Compensation — Whether compensation be ordered for Government — Taking other offences into consideration — Charge of using as genuine a forged document — Penal Code, ss. 465 and 471 — Criminal Procedure Code (F.M.S. Cap. 6), ss. 171, 283 and 426.*

In this case the accused had pleaded guilty to three charges of offences of using as genuine a forged document. He was sentenced to a term of two years' imprisonment on each charge, the sentences to run consecutively. In addition he was ordered after completion of his imprisonment "to pay government a fine of $3,000 on each charge by monthly instalments of $100 in default four months' imprisonment in respect of each instalment." The court took into consideration two other offences but no record was made that the consent of the prosecutor and the accused was obtained.

**Held:** (1) the sentence of fine was illegal as it contravened section 283 of the Criminal Procedure Code in that the total term of imprisonment in default might amount to 30 years;

(2) section 426 of the Criminal Procedure Code which enables the court to make an order for the payment of compensation to "any person or to the representatives of any person injured" does not contemplate an order in favour of the Government;

(3) before outstanding offences could be taken into account the consent of the prosecutor and the accused must be obtained and this fact included in the record but this was not done in this case;

(4) the fine and sentence in default should be set aside and the sentences of two years' imprisonment should be ordered to run concurrently.

FEDERAL COURT.

Appellant in person.

*Abdul Wahab Patail* (Deputy Public Prosecutor) for the respondent.

**Ong Hock Sim F.J.** (read by Lee Hun Hoe C.J. (Borneo) delivering the judgment of the Court): The appellant was convicted, on his own plea of guilty, in the High Court in Borneo at Kota Kinabalu on May 23, 1977 on three charges of an offence under section 471 of the Penal Code and punishable under section 465. He was sentenced to a term of two years on each charge, which is the maximum under section 465, but it was ordered that the sentences were to run consecutively. Additionally, he was ordered, after completion of his imprisonment, "to pay Government a fine of $3,000 on each charge ... by monthly instalments of $100 ... in default four months' imprisonment in respect of each instalment." Having pleaded guilty, he can only appeal, as provided in the Criminal Procedure Code, as to the extent and legality of the sentence (section 305).

In so far as the sentence of fine is concerned, we are clearly of the view that it is illegal, as being in contravention of section 283 of the Criminal Procedure Code which enacts: —

"283. (i) Where any fine is imposed under the authority of any law for the time being in force, then, in the absence of any express provision relating to such fine in such law contained, the provisions following shall apply (that is to say) —

(c) the period for which the court directs the offender to be imprisoned in default of payment of fine shall not exceed the following scale —

(1) if the offence is punishable with imprisonment:—

| Where the maximum term of imprisonment — | The period shall not exceed — |
|---|---|
| exceeds six months but does not exceed two years." | six months |

Mathematical calculation would indicate that with $9,000 fine to pay by instalments of $100 in default four months for each instalment, the appellant, if unable to pay any, would only be able to atone by serving another 30 years' imprisonment.

At the conclusion of the trial, the learned deputy asked that "the sentence passed be meaningful" and referred to section 426(1)(b) of the Criminal Procedure Code. While "fine" is defined in section 2 to include "compensation adjudged upon any conviction," in our view section 426 refers to a person injured or to the representatives of such person and we do not think that the Government is within the contemplation of the section.

The appellant was unrepresented and admitted his offence. The facts as presented showed a young man of 26 years holding the responsible post of financial clerk to the Ministry of Culture, Youth and Sports earning a nett salary of $370 per mensem. He admitted a previous conviction in March 1977 of an offence under section 468 of the Penal Code involving a sum of $14,260. In his judgment, the learned judge said: "The court was also asked by the prosecution and I have taken into account the outstanding offences." These appear on the record of this appeal. We were somewhat taken aback that two offences so taken into account related to offences committed on January 2, 1975 and January 17, 1975, when the appellant only commenced work with the ministry from March 12, 1975. We were not enlightened by the learned deputy, who was equally, like us, taken aback. Section 171 which provides for other offences provide in subsection (i) that this may be done "with the consent of the prosecutor and the accused" and in subsection (ii) that "the court shall enter or cause an entry to that effect to be made on the record." We regret we could not find such entry on the record.

In all the circumstances, we are of the view, and we do hereby order —

(1) that the fine and sentence in default of payment be set aside; and

(2) that the sentence of two years' imprisonment do run concurrently.

*Order accordingly.*

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## LUK KAI LAM v. SIM AI LENG

**[F.C. (Lee Hun Hoe C.J. (Borneo), Ong Hock Sim F.J. and Yusoff J.) October 6, 1977 and January 4, 1978]**

**[Kuching — Federal Court Civil Appeal No. 105 of 1977]**

*Tort — Slander — Words imputing unchastity or adultery to woman — Actionable per se — Claim of privilege — Malice — Whether necessary for plaintiff to specifically allege malice — R.S.C., 1957, O. 19 r. 22.*

*Libel and Slander — Slander — Words imputing unchastity or adultery to woman — Defamation Act, 1957 ss. 4 & 5*

This was an appeal against the decision of the learned judge of the High Court on the question of slander arising out of a counterclaim. The learned judge found that the respondent had used against the appellant words which were slanderous in that they imputed adultery or unchastity but was of the view that the words were slanderous of the appellant as a woman and not in the way of her profession and office as a staff nurse. Subsequently there was a meeting called with a view to settling matters. At that meeting the appellant made certain slanderous remarks against the respondent imputing unchastity to the respondent. The learned trial judge found the occasion was a privileged one but held that the words were spoken out of malice and the defence of qualified privilege failed. He awarded the appellant $1,500 damages against the respondent and the respondent $1,250 damages against the appellant. The appellant appealed. It was argued *inter alia* (a) the learned trial judge was wrong in holding that the appellant was not slandered in the way of her profession and office; (b) that the words constituting the slander were spoken and published in the presence of a witness; (c) that the learned judge should not have held that the words were spoken out of malice as the respondent had not delivered a reply to the appellant's claim of privilege.

**Held:** (1) on the evidence the learned judge was right to say that he did not consider the words were calculated to disparage the appellant in her office, profession or calling held by her at the time of publication;

(2) the learned judge saw and heard all the witnesses and he was clearly satisfied that there was publication;

(3) where it is necessary for the plaintiff to prove that the defendant was actuated by an improper motive he need not specifically allege malice in his reply if he has already done so in his statement of claim or if the defendant in his defence has pleaded that he acted in good faith. If the plaintiff has already alleged malice in his statement of claim the proviso to Order 19 rule 22 does not come into play.

*Cases referred to:*

(1) *Hopwood* v. *Muirson* [1945] 1 All E.R. 453.

(2) *Jones* v. *Jones* [1916] 2 A.C. 481.

(3) *Smith* v. *Lewis* (1917) 142 L.T. 263.